

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO. 894 of 2014

H. H. Girls School & others ----- Plaintiff(s)

Versus

The Sindh Building Control Authority & others -----Defendants

SUIT NO. 895 of 2014

H. H. Girls School & others ----- Plaintiff(s)

Versus

The Sindh Building Control Authority & others -----Defendants

For orders on CMA No. 15664/2014

For hearing of CMA No. 7363/2014 & 7365/2014.

Date of hearing: 08.4.2014

Date of Order: 27.4.2014

Plaintiff(s): Through Tasawwar Ali Hashmi Advocate.

Defendant No. 1 Through Ms. Nasreen Sehto Advocate.

Defendant No. 2 Through Mr. S. Iftikharul Hassan Advocate.

Defendant No. 4 Through Mr. Usman Shaikh Advocate.

“Builders” Through Mr. K. A. Wahab Advocate in Suit No 894 of 2015 and Through Mr. Abdur Rahman Advocate in Suit No 895 of 2015.

O R D E R

Muhammad Junaid Ghaffar, J. Through this common order all aforesaid listed applications in both the Suits are being disposed of. CMA No. 7363 of 2014 has been filed under order 39 Rule 1 & 2 CPC on behalf of the plaintiff(s) in Suit No. 894 of 2014, whereas CMA No. 7365 of 2014 has also been filed under order 39 Rule 1 & 2 CPC along with CMA No. 15664 of 2014 under order 39 Rule 2(3) CPC read with Sections 3 & 4 of Contempt of Court Ordinance, 2003 on behalf of the plaintiff(s) in Suit No. 895 of 2014.

2. Both the aforesaid Suits have been filed by the Plaintiff(s) in respect of alleged unlawful raising of construction of high rise buildings by Defendant No.5 in both the Suits, who are builders and constructors and shall be referred to as “Builders” hereinafter. In both the Suits the plaintiff(s) have sought the following relief(s):-

“Suit No. 894/2014.

- i) Declare that the construction on amalgamated / commercialized plot No. 104, Dhoraji Colony is illegal;
- ii) declaration that the construction of building by “Builders” without increasing width of the road from 60 to 80 feet is against the NOC issued by defendant No. 3 and that the building cannot be constructed without fulfilling the condition of such NOC;
- iii) permanent injunction restraining the defendants from allowing / permitting / constructing multistoried building on Plot No. C-104 Dhoraji Colony, except Ground plus 1st floor;

- iv) permanent injunction restraining the “Builders” from constructing the building without widening the Road to 80 feet;
- v) cost of the Suit;
- vi) any other / further / additional relief / reliefs, which this Hon’ble Court may deem fit and proper in the circumstances of the case.

“Suit No. 895/2014.

- i) Declare that the construction on amalgamated / commercialized plot No. C-115, C-116, Dhoraji Colony is illegal;
- ii) declaration that the construction of building by “Builders” without increasing width of the road from 60 to 80 feet is against the NOC dated 7.2.2103 issued by defendant No. 3 and that the building cannot be constructed without fulfilling the condition of such NOC;
- iii) permanent injunction restraining the defendants from allowing / permitting / constructing multistoried building on Plot No. C-115, C-116, Dhoraji Colony, except Ground plus 1st floor;
- iv) permanent injunction restraining the “Builders” from constructing the building without widening the Road to 80 feet;
- v) cost of the Suit;
- vi) any other / further / additional relief / reliefs, which this Hon’ble Court may deem fit and proper in the circumstances of the case.”

3. Through listed application(s) under order 39 Rule 1 & 2 CPC, the plaintiff(s) have sought interim orders, to the effect that the “Builders” who are purportedly the owners of the plots in question, be restrained from raising any construction on Plot No. C-115 & 116, and Plot No. C-104, both located at Nishter Road, Block No. IV & V Scheme No. 7, Dhorajee Colony, Karachi. It is the case of the plaintiff(s), that they are residents of Dhoraji Colony, Karachi and are living in the vicinity of the proposed multistoried buildings, being constructed by the “Builders” on the

aforesaid plots. It is the case of the plaintiff(s) that the proposed construction is not in accordance with the approved building plan and so also in violation of the No objection certificate (NOC) issued to the “Builders”, whereby, conversion of residential plot has been allowed into a Commercial plot. It has been contended by the learned Counsel for the plaintiff(s) that the “Builders” were granted permission by KMC vide NOC dated 7.2.2013 in respect of both the plots in question, whereas, the proposed construction is in violation of the conditions stipulated in the said NOC. Per learned Counsel the NOC had allowed conversion of the plots in question from residential to commercial purposes, with the condition that 10 feet wide strip of lane on both sides has to be left open to increase the road width from 60 to 80 feet and no construction shall be carried out in the setback area. It is further submitted by the learned Counsel that this Court vide order dated 21.7.2014 appointed a Commissioner for carrying out inspection of the premises in question, who has submitted his report dated 1.9.2014 which also confirms the contention of the plaintiff(s). Per learned Counsel the proposed construction of multi-storied building cannot be allowed in front of the school being run by the plaintiff No.1, whereas, the minimum width of the road in question has to be 80 feet. Per learned Counsel the construction at the most could only be allowed for ground plus four floors, as other buildings in the area are also not more than four floors. Learned Counsel further contended that if the proposed building is allowed to be constructed, there would be a serious traffic

congestion issue, whereas, water and electricity is already in scarcity, hence listed applications be allowed and the defendants be restrained permanently from raising any construction on the prosed site. In support of his contention the learned Counsel relied upon the cases reported as ***Abdul Waheed Butt Vs. Mrs. Asma and 4 others 1989 CLC 1936, M/S Khalil Jute Mills Ltd. Vs. United Bank Limited & 5 others 1994 SCMR 512, Nadir Khan and others VS. Principal, Khyber Medical College, Peshaware and others 1995 SCMR 421, M/S Excel Builders and others Vs. Ardeshir Cowasjee and others 1999 SCMR 2089 and Jawad Mir Muhammadi and others Vs. Haroon Mirza and others (PLD 2007 SC 472).***

4. Conversely Mr. Abdul Rehman leaned Counsel for the “Builders” in Suit No. 895 of 2014 has controverted the contention so raised on behalf of the plaintiff(s), and referred to the prayer clause in the instant Suit and has conceded that the “Builders” will have no objection if the instant Suit of the plaintiff(s) is decreed in terms of prayer clause 2 and 4 as the “Builders” are not raising any construction either against the approved building plan nor have violated the conditions of NOC dated 7.2.2013. Learned Counsel has further contended that in view of the Site plan issued to the “Builders” filed along with the Counter Affidavit, it is clearly reflected that the Builder has left an open space of 10 feet as setback in front of the plot, which is strictly in compliance with the NOC issued to “Builder”. Learned Counsel also referred to Regulation No. 25-3 of the Karachi Building and Town Planning

Regulations, 2002 and submitted that the plot in question after deduction of 10 feet width as setback, is having an area of 1417 square yards, in which a floor area ratio (FAR) of 1:2.55 is permitted and therefore no objection can be taken on the height of the building which is in accordance with KBTPR Regulations, 2002. Learned Counsel further submitted that even the report of Commissioner dated 1.9.2014 is in favor of the “Builders” whereby, it has been confirmed that an open area of 10 feet has been left open as setback by the builders. Learned Counsel further contended that the “Builders” cannot be penalized or prejudiced by asking to leave an open area as setback in respect of other plots on the road which otherwise, is an impossibility for the “Builders”. In support of his contention learned Counsel has relied upon the case reported in ***Jawad Mir Muhammadi and others Vs. Haroon Mirza and others (PLD 2007 SC 472)***.

5. Mr. K. A. Wahab leaned Counsel for “Builder” in Suit No. 894 of 2014 has adopted the arguments of Mr. Abdur Rehman Advocate and additionally submitted that insofar as the approved building plan of “Builder” is concerned, the same has not been challenged / impugned, whereas, the “Builder” undertakes to strictly abide by prayer clause 2 of instant Suit as the “Builder” has already left a 10 feet open space as setback in compliance of the NOC dated 7.2.2013. In support of his contention the learned Counsel has relied upon the case reported in ***Farooq Ahmed & 2 others Vs. Lahore Development Authority (2006 YLR 1539)***

and Barkat Ali and another Vs. Mst. Fatima Bai and 2 others (1995 CLC 1012).

6. Mr. Usman Shaikh learned Counsel appearing on behalf of Defendant No.1 (SBCA) submitted that they have already filed Counter Affidavit / written statement and according to them, till date, there is no violation alleged against the “Builders” and the construction so far carried out is in accordance with the approved building plan. Similarly Mr. Iftikharul Hassan learned Counsel appearing on behalf of KMC has contended that no violation has been committed by the “Builders” in respect of the construction being carried out by them, whereas, they have complied with the requirement of NOC dated 7.2.2013.

7. I have heard all the learned Counsel, perused the record and case law relied upon by the parties. It appears that the plaintiff No.1 in both the Suits is a Girls School managed and run by a Charitable Trust, whereas, the other plaintiff(s) are residents of the area known as Dhorajee Colony, Karachi. The primary grievance, which has been raised in the instant Suit on behalf of the plaintiff(s) is, that the “Builders” in both the Suits have been allowed to raise construction on their plots in violation of the terms and conditions of NOC dated 7.2.2013, whereas, no High Rise building having 15 floors or more could be allowed in a residential vicinity, as otherwise the same will cause nuisance and other related problems for the residents. The precise objection raised on behalf of the plaintiff(s) is in respect of the NOC dated

7.2.2013, wherein, according to the Plaintiff(s) some conditions have been attached while allowing conversion of the aforesaid plots from residential to commercial use. It would be advantageous to refer to the relevant portion of the NOC dated 7.2.2013 which reads as under:-

“KARCHI METROPOLITAN CORPORATION
MASTER PLAN DEPARTMENT (KDA WING)

Room No. CR 806 8th Floor Civic Centre Gulshan-e-Iqbal Karachi Tel:99230216

NO: KMC/MPD/COM/13/480/2

Dated 7.2.2103

Director,
Land Management-I (KDA Wing),
Karachi Metropolitan Corporation
Karachi.

SUBJECT: NOC FOR CONVERSION OF LAND USE OF PLOT NO. C-115 BLOCK IV & V SCHEME-7, DHORAJI COLONY KRACHI FROM RESIDENTIAL TO COMMERCIAL (MESURING 1417 SQ. YDS)

Reference: 1. Application No. 1313, dated 03.09.2012
2. KMC Council Resolution No. 50 dated 21.12.2012.

With reference to the application of the owner of Plot NO. C-115, Block IV & V Sch-7 Dhoraji Colony Karachi, please note that City Council Resolution No. 383 dated 06.01.2004 as well as KMC Council Resolution No. 50 dated 21.12.2012 allow the Conversion of plot No. C-115, Block IV & V Sch-7 Dhoraji Colony Karachi from Residential to Commercial purpose only with the condition that 10' feet wide strip of lane on both side shall be given to increase the road width from 60' to 80' feet and no construction shall be carried out in the set back area.”(Emphasis supplied)

8. From perusal of the aforesaid portion of the NOC, it appears that though no objection has been raised on behalf of the plaintiff(s) regarding merits of the conversion of the residential plots to commercial, however, the plaintiff(s) have urged that the conditions stipulated in the aforesaid NOC, whereby, the conversion has been allowed only, when 10 feet wide strip of lane

on both sides of the road is left open to increase the road width from 60 to 80 feet, has not been complied with and is being rather violated. It is the case of the Plaintiff(s) that the NOC can only be termed as valid, when the condition of leaving 10 feet wide strip of lane is left open on both sides of the road and not otherwise. It is their case that though the “builders” have left open space of 10 feet in front of their plots, however, until and unless the 10 feet wide open space is not left open across the road, the NOC’s conditions are not fulfilled; hence, commercial use of the plots in question is prohibited. However, from perusal of the record and the report of the Commissioner dated 1.9.2014, it appears that insofar as the “Builders” are concerned, they have left open space of 10 feet in front of their plots as setback, and have also undertaken, that no construction is being carried out by them in the said portion of plot having a width of 10 feet. On perusal of the Site plan it also reflects that open space of 10 feet has been left open by the “Builders” in both the Suits. Whereas, it has been undertaken by them that they have no objection if the Suit of the plaintiff(s) is decreed in respect of prayer clause 2 & 4 as they have not violated the conditions stipulated in the aforesaid NOC dated 7.2.2013. Insofar as the contention of the plaintiff(s) to the effect that the road has to be left open with a 10 feet wide strip on both the sides of the road and the same has to be complied with by “Builders”, is concerned, the same appears to be misconceived and not in accordance with the spirit of the NOC and the condition(s) stipulated therein. It cannot be the intention of the

regulator / KMC to ask the owner of a plot to leave an open space of 10 feet wide strip on his side of the plot and so also to ensure that the other party, just opposite on the other side of the road, shall also leave an open space of 10 feet as setback, failing which the condition(s) of NOC could not be fulfilled and complied with. Such an interpretation of the NOC as being stressed upon on behalf of the plaintiff(s) appears to be absurd and impractical. The “Builders” have complied with such condition of NOC dated 7.2.2103 and have left open a 10 feet space as setback in compliance of the NOC, therefore, insofar as the contention of the learned Counsel for the plaintiff(s) to the effect that such space of 10 feet is required to be left open on both sides of the roads and also along entire length of the road by “Builders” is misconceived and is hereby repelled. However, if the plaintiff(s) so choose, such objection, if any, can be raised by them with regard to leaving of open space as setback by other owners of the plot for which they may seek appropriate remedy in accordance with law.

9. Insofar as placing reliance on the case law as referred to herein above by the learned Counsel for the plaintiff(s) is concerned, there is no cavil to the proposition that no construction can be carried out in violation of an approved plan, however, in the instant case it has come on record that no violation of the approved plan has been committed by the “Builders”, whereas the official defendants including SBCA and KMC have also confirmed such position. The only grievance of the plaintiff(s) is in respect of the alleged non compliance of the NOC

dated 7.2.2103 in totality as referred to hereinabove. The learned Counsel for the Plaintiff(s) has vehemently relied upon the case of *M/S Excel Builders and others (Supra)* and contended that in the said matter also the road had been encroached upon by the Builders and the Hon'ble Supreme Court had ordered demolition of such construction. I may observe, with respect, that the contention of the learned Counsel for the Plaintiff(s) by placing reliance on the said case is misconceived, and not applicable on the facts of the instant case, as in that case the Hon'ble Supreme Court had come to the conclusion that the construction was carried out in violation of the *layout plan* of the Area in question, whereas the layout plan which had been relied upon by the builder, was found to be a forged one and accordingly the construction so raised on such portion of the road was ordered to be demolished. On the contrary, the case of ***Jawad Mir Muhammadi and others Vs. Haroon Mirza and others (PLD 2007 SC 472)*** gives a complete answer to the contention raised on behalf of the plaintiff(s). The Hon'ble Supreme Court in the aforesaid case after having placed reliance on the case of *Ardeshir Cowasjee (1999 SCMR 2883)* had drawn certain inferences and or deductions with regard to conversion of plots and raising construction of High Rise buildings. It would be relevant to refer to the relevant findings of the Hon'ble Supreme Court in the aforesaid case which reads as under:-

From a perusal of the above quotations from the judgment in the case of Ardeshir Cowasjee 1999 SCMR 2883 following inference or deductions can be made:-

- (i) That plot designated as an amenity plot and reserved for a public benefit/facility such as hospital, school, college, library, park, play ground, community centre, etc, the nature or user thereof can never be converted for residential or commercial use.
- (ii) That a residential plot can be converted into a commercial or commercial-cum-residential in accordance with the provisions of KDA Order, Ordinance and the Regulations as there is no specific bar of such conversion in all the said laws/regulations.
- (iii) That there is no impediment in the construction of high rise building on a plot after change/conversion of its user from residential to commercial or residential-cum-commercial provided that the provisions relating to the conversion of plot and commercialization contained in the laws/regulations referred to hereinabove are complied with and the concerned authorities undertake to provide new infrastructure for provision of enhanced water supply, electricity, gas, provide better sewerage system, roads and ensure enjoyment of peaceful life to the residents of the locality.
- (iv) That construction of a high rise building not strictly in accordance with the provisions of law and suffering from irregularities can be regularized by compounding the irregularities and payment of composite fee provided that there is no violation of the laws/regulations and further that the violation are of the nature which can be regularized.

10. In the same judgment the Hon'ble Supreme Court has also dealt with regard to the objection raised on behalf of the plaintiff(s) that such construction, if allowed to be carried out, would cause extra burden on the utilities as well as traffic congestion. Again it would be advantageous to refer to the relevant findings of the Hon'ble Supreme Court in this regard, which reads as under:-

25. As regards the deprivation of the rights to light, fresh air and clean environment, it is noted that infringement of such rights can

be established only by producing satisfactory evidence and not merely on the statement in the pleadings of the affected party. There is no material on record to prove the allegation of the appellants relating to deprivation or, violation of the above easementary rights by construction of the alleged illegal floors. It is their unfounded apprehension based on subjective and abstract consideration. The hardships inconvenience, or discomfort likely to result by the building in question must be more than "mere delicacy of fastidiousness and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or inconvenience must be such which the law considers as substantial or material". The appellants have failed to prove infringement of their rights of privacy, light, fresh air and pollution free environment as there is no material to substantiate their infringement.

26. So far as the question of adverse affect due to extra burden on the utilities is concerned it is suffice to say that the respondent No.3/concerned Authorities are duty bound to provide adequate relief by providing necessary infrastructure for increasing water supply, electricity, gas and laying down sewerage lines of bigger dimensions to meet the demand of extra burden and they can be activated to perform their duties. This appears to be appropriate and viable solution rather than if demolition of alleged unauthorized/illegal floor which have been regularized in accordance with law.

11. In view of herein above facts and circumstances of the instant case and the observations of the Hon'ble Supreme Court as referred to hereinabove, I am of the view that no violation has been brought to the notice of this Court in respect of NOC dated 7.2.2013, whereby, the Builders could be restrained from raising construction on the aforesaid plots, whereas the official defendants including SBCA and KMC have also not alleged any violation of the approved building plan, nor of the NOC dated 7.2.2013. It is settled law that while deciding an interlocutory application for injunction, the Plaintiff(s) have to make out a prima facie case and to show that irreparable loss would be cause to them if no such injunctive order is passed in their favor. In the

instant case, I am afraid, neither any prima facie case has been made out nor the balance of convenience is in favor of the Plaintiff(s) and no irreparable loss would be caused to the plaintiff(s) if injunction is refused, whereas, if the injunctive relief as sought is granted and the construction is not allowed to be raised in accordance with the approved building plan, it would cause irreparable loss to the Builders as the construction work has been stopped by the ad-interim orders passed in the instant matter. Reliance in this regard may be placed on the case of ***Mrs. Shazadi Baber Vs. Hina Housing Project (Pvt) Limited and others (1994 CLC 1601)*** and ***Sayyid Yousuf Husain Shiraza Vs. Pakistan Defence Housing Authority and 2 others (2010 MLD 1267)***.

12. Accordingly, applications bearing CMA No. 7363 of 2014 in Suit No. 894 of 2014 & CMA No. 7365 of 2014 in Suit No. 895 of 2014 are hereby dismissed, whereas application bearing CMA No.15664 of 2014 in Suit No 895 of 2014 for contempt of ad-interim orders is dismissed as in-fructuous. Resultantly, ad-interim orders passed by this Court on 29.5.2014 stands vacated/recalled. Before parting with this order I may observe that aforesaid findings are tentative in nature and shall not cause prejudice to any of the parties at the trial which shall be concluded and decided in accordance with law.

27.4.2015

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